

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In Re Application of)	
)	
McElroy Electronics Corporation)	File No.
)	WT Docket No. 07-16
For Authorization to Construct and Operate)	
A Nationwide Wireless Broadband Network)	
in the 2155–2175 MHz Band)	

To: Managing Director & Chief,
 Wireless Telecommunications Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

McElroy Electronics Corporation (“McElroy Electronics”), by its attorneys and pursuant to § 1.106(h) of the Commission’s Rules (“Rules”), hereby replies to the Opposition to Petition for Reconsideration (“Opposition”) filed by M2Z Networks, Inc. (“M2Z”) with respect to McElroy Electronics’ above-captioned application

Comparing its use of the radio service code “BR” with that of McElroy Electronics, M2Z sees a “clear distinction” in the fact that it “explicitly sought and provided an extensive justification” for a waiver in connection with its use of the code. Opposition, at 2-3 M2Z explicitly sought the waiver of only one rule: the electronic filing requirement of § 1.913(b) of the Rules.¹ That rule requires (with certain exceptions specified in § 1.913(d)) that applications on FCC Form 601 be filed electronically in accordance with the instructions for the Commission’s Universal Licensing System (“ULS”) *See* 47 C.F.R. § 1.913(b)

Like all rules, § 1.913(b) can be waived by the Commission on its own motion. ***See id.*** §§ 1.3, 1.925(a). And it was waived in this case.

¹ *See* Application for License and Authority to Provide National Broadband Radio Service in the 2155-2175 MHz, at 43 (Sept. 1, 2006).

On January 23, 2007, after noting that “additional applications for spectrum in [the 2155-217.5 MHz] band may be filed while the M2Z application is pending,” the Wireless Telecommunications Bureau (“WTB”) announced that such “additional applications may be filed using the Commission’s Electronic Comment Filing System (ECFS) or by filing paper copies.” *WTB Announces that M2Z Networks, Inc.’s Application for License and Authority to Provide a National Broadband Radio Service in the 2155-217.5 MHz Band Is Accepted for Filing*, 22 FCC Rcd 1955, 1956 (WTB 2007) (“*M2Z Acceptance PN*”). By its announcement, the WTB gave notice that it had effectively waived § 1.913(b) of the Rules to permit applications to be filed in this proceeding either by using the ECFS in lieu of the ULS or by filing a paper copy., Consequently, there was no need for McElroy Electronics to seek a waiver of an already-waived rule.,

M2Z contends that McElroy Electronics could not rely on “staff advice” in preparing and filing its application. Opposition, at 3. However, McElroy Electronics explicitly relied on the *M2Z Acceptance PN* when it filed its application both manually and via the ECFS.² That reliance was entirely reasonable.

Section 0.445(e) of the Rules entitled McElroy Electronics to rely on the WTB’s published announcement that applications could be filed manually or by using the ECFS. See 47 C.F.R. § 0.445(e). Quite apart from the Rules, having publicly announced that applications may be filed via the ECFS, the WTB created a “reasonable expectation” in McElroy Electronics and the other competing applicants that they could file their applications in accordance with the *M2Z*

² See **FCC** Form 601, Ex. 1 at 2. It was the rejection of the manually-filed application that engendered McElroy Electronics’ Petition for Reconsideration. McElroy Electronics will not resubmit its application to the Commission’s Pittsburgh office pending disposition of its petition. In any event, McElroy Electronics’ electronically-filed application has not been dismissed.

Acceptance PN. See *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976). Having created the expectation, the WTB became bound to fulfill it by adhering to the filing procedure that it established for this proceeding. See *Gardner*, 530 F.2d at 1089-90. Thus, the WTB must retain McElroy Electronics' electronically-filed application on file irrespective of the dismissal of its manually-filed version of its proposal

Finally, it must be remembered that the staff did not reject the paper version of McElroy Electronics' application because it was defective under the Rules. The staff explained that it **was** following the WTB's announcement in 2005 that it was not accepting applications for new geographic licenses in the Broadband Radio Service. See *WTB Announces Changes to the ULS to Accommodate the Broadband Radio Service and Educational Broadband Service and Reminds Licensees thnt Use of ULS Forms and Electronic Filing for these Services Becomes Mandatory on July 11, 2005*, 20 FCC Rcd 11554, 11559 (WTB 2005). That announcement was superceded by the *M2Z Acceptance PN* which gave notice that an application for a nationwide license in the Broadband Radio Service had been accepted for filing. Since the WTB had accepted an application displaying the radio service code "BR," McElroy Electronics was free to submit a similar proposal under the Commission's current policy for the 2155-2175 MHz band

Respectfully submitted,



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April 23, 2007

CERTIFICATE OF SERVICE

I, Linda J. Evans, a secretary in the law office of Lukas, Nace, Gutierrez & Sachs, Chartered, hereby certify that I have, on this 23rd day of April, 2007, caused to be mailed, postage pre-paid, a copy of the foregoing Reply to Opposition to Petition for Reconsideration to the following:

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